OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

June 23, 1999

Ms. Susan Combs
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR99-1745

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 125132. Your office has assigned this request tracking number TDA-OR-99-0044.

The Texas Department of Agriculture (the "department") received a request for a variety of information concerning "any complaint regarding the use of Quinclorac from January 1, 1994 to the present." You indicate that the request encompasses information concerning department investigations into possible violations of state or federal pesticide laws. In response to the request, you submit to this office for review the information which you assert is responsive. You claim that the requested information, submitted as Exhibits B, C, and D, is excepted from required public disclosure based on sections 552.101,[1] 552.107 and 552.111 of the Government Code. You further inform us that the department is not releasing to the requestor copies of medical records. *See* V.T.C.S. art. 4495b, § 5.08. We have considered the exceptions and arguments you have raised and reviewed the submitted information.[2]

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[1]Although early open records decisions permitted governmental bodies to withhold from disclosure information within the attorney-client privilege pursuant to section 552.101, the privilege is specifically covered under section 552.107(1). Section 552.107 is the appropriate section to cite when seeking to withhold from disclosure communications between the governmental body and its legal counsel. *See* Open Records Decision No. 574 (1990).

[2]We assume that any other responsive information that is not at issue will be provided to the requestor.

You inform us that the requested investigative materials concern cases that were subject to contested case procedures under section 12.020 of the Agriculture Code and chapter 2001 of the Government Code, but that are now closed. You assert that the bulk of the information at issue is attorney work product, excepted from disclosure under section 552.111 of the Government Code. Section 552.111 is the proper exception under which to claim protection for attorney work product once the litigation for which the work product was prepared has concluded. Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S,W,2d 749 (Tex. 1991)). Section 552.111 of the Government Code excepts from required public disclosure:

> An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material was 1) created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.* When showing that the documents at issue were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 5.

You state that the information at issue was collected and prepared by the department and/or the Environmental Protection Agency for the purpose of proving violations of state or federal pesticide laws in an administrative, civil or criminal hearing or for trial. *See generally* Agric. Code ch. 76. We conclude that the department has met the first prong of the work product test.

We now consider whether the information reveals the attorney's mental processes, conclusions and legal theories. Having reviewed the information and your arguments, for the bulk of the information, we conclude that the information reveals attorney mental impressions, conclusions and strategy. However, the information at issue contains summaries and other information that refers to the facts of a case. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning*, 818 S.W.2d at 750 n. 2). Moreover, the privilege does not protect memoranda prepared by an attorney that contain

only a "neutral recital" of facts. *See Leede Oil & Gas, Inc. v. McCorkle,* 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ). However, in *Leede*, the court noted that the attorney notes did not show how the attorney would use the facts, if at all, nor did the notes suggest trial strategy or indicate the lawyer's reaction to the facts. *See id.* at 687. We believe that an attorney's selection and organization of facts of a case may reveal the attorney's mental impression and strategy of the case. *See Marshall v. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede,* 789 S.W.2d at 686.[3]

With regard to the facts that appear on certain documents in the case files, you state:

> These facts were selected and ordered by the department's legal staff from existing sources, rather than directly acquired, as part of the legal analysis of the investigation. The facts are selected and ordered for the purpose of aiding the attorney in his or her evaluation of the anticipated litigation. Because the facts have been selected and ordered by the agency for the purpose of determining and communicating the legal basis and strategy for the proposed action, such recitations are non-neutral, rather than purely factual or basically factual, summaries or communications. Disclosure of such recitations would tend to reveal the attorney's mental impressions, thought processes, and legal strategy regarding the anticipated litigation. The recitations also represent the attorney's implied or express opinion regarding the importance or meaning of specific facts.

(Footnotes omitted). We have reviewed the information and your arguments. Based on your representation that the attorney made the decision to include the facts in the summaries, we believe the facts would reveal the attorney's impressions and strategy. We therefore agree that such facts within Exhibits B, C and D are attorney work product and excepted from disclosure under section 552.111. The department, therefore, may withhold such information in its entirety pursuant to section 552.111.

Finally, we consider whether the information in Exhibit C, some of which has been marked, must be withheld under section 552.101 in conjunction the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, which protects from disclosure

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[3]The privilege does not apply where the party seeking to discover information shows that the information is 1) hidden in the attorney's file and 2) essential to the preparation of one's case. *Hickman v. Taylor*, 329 U.S. 495 (1947); *see Marshall v. Hall*, 943 S.W.2d 180, 183 (Tex. App.--Houston [1st Dist.] 1997, no writ). While the open records context provides no opportunity for the requestor to make such a showing, we assume that in the usual case, the documents the department releases to the requestor contain the facts of the case.

"[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. Certain portions of the submitted documents include medical record information access to which is governed by provisions outside the Open Records Act. *Id.* The department may only release this information in accordance with the MPA.

In light of our conclusions under sections 552.101 and 552.111, we need not address your other claimed exception at this time. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

Sam Haddad

Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 125132

Encl.: Submitted documents

cc: Mr. John Tull, III
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(w/o enclosures)